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IN THE

Supreme Court of the United States

October Term, 1952

No. 365.

JACK DRAGNA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief of Respondent in Opposition to the Granting of Petition for Writ of Certiorari.

To the Honorable Fred Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Statement of the Case.

The petitioner, Jack Dragna, was charged in a verified complaint with having violated the provisions of Section 41.07 of the Los Angeles Municipal Code, and of violating the provisions of a portion of subdivision 5 of Section 647 of the Penal Code of the State of California [R. 1].

The evidence revealed that petitioner was followed by members of the Los Angeles Police Department for some period of time [R. 96-97]. Dictagraphs were installed at the direction of a commanding officer of the Police Department in several apartments where petitioner and one Annette Eckhart were seen. At an apartment on

Kenmore Avenue equipment was maintained for a period of two or three months, and later at an apartment on Mariposa Street for some two months [R. 18; 99; 107; 110; 132]. The use of these microphones did not in any way tap telephone wires [R. 48; 202]. At the Kenmore address a microphone had been placed in a chair, and at the Mariposa address a microphone had been placed in the headboard of the bed [R. 25; 48-49; 84; 134].

Petitioner and Annette Eckhart were seen together in other places during this period [R. 39; 41; 51; 180].

Listening posts were provided where the officers were able to listen in and hear the conversations of these parties. The officers who listened were acquainted with Jack Dragna and Annette Eckhart, having spoken to them, and were familiar with their voices [R. 17-18; 19; 27-28; 117; 119].

Petitioner was not married to Annette Eckhart but rented apartment 7 at 330 South Mariposa Street as "Mr. and Mrs. John and Annette Eckhart." He paid the rent there on several occasions [R. 204-205; 215-216].

On March 11, 1951, petitioner and Annette Eckhart went into the apartment house at about 1:30 A. M. A light was seen to go on in the bedroom of apartment 7. The officers took up their positions at the listening post and heard and identified the voices of these persons [R. 19-20; 120-121]. The conversation and noises heard indicated that sexual intercourse and acts of sex perversion

were taking place in this room between these persons [R. 69-71; 103-104; 114; 122-124; 162; 182].

Conversations between these persons heard in June of 1950, at the Kenmore address, were related by the officers which also indicated the character of petitioner to be that of a lewd and dissolute person [R. 78; 87; 95-96; 128-129; 130-131; 190].

The petitioner did not take the stand nor offer any evidence to rebut any of the implications of the conversations attributed to him [R. 7-8].

From this evidence the jury concluded that on the date alleged petitioner, with Annette Eckhart, did resort to the bedroom of apartment 7 to engage in sexual intercourse or to perform and participate in a lewd act and that from all the evidence of conduct and conversation of petitioner, that he was a lewd and dissolute person [R. 8; 329].

The Appellate Department of the Superior Court of Los Angeles County affirmed the judgment of conviction stating that "The evidence was sufficient to support the conviction on each count," and that "Throughout the trial of this case counsel for both parties cooperated with the trial court and with each other to avoid incidents that would result in a trial unfair either to the defendant or to the People. We are of the opinion that their efforts proved successful. A conviction is obviously not an indication that a trial was in any way unfair. The defendant was convicted on sufficient evidence without prejudicial irregularities." [R. 357-360.]

I.

Evidence Obtained by Use of Microphones Does Not Offend Due Process of Law.

The rule adopted by the United States Courts concerning the admissibility of evidence obtained by the use of microphone or by wire-tapping is not followed in California. In California it is established and universally recognized that, where competent evidence is produced and offered, the court will not inquire into or investigate its source or the means by which it was obtained.

Evidence obtained by illegal search and seizure does not affect its admissibility, and although a defendant may have civil or criminal remedies against the officers by reason of their unlawful acts, the state may nevertheless use the evidence so illegally obtained.

People v. Channel, 107 Cal. App. 2d 192, 199;

People v. Kelley, 22 Cal. 2d 169, 173;

People v. Gonzales, 20 Cal. 2d 165.

It has been stated that a criminal trial does not constitute a denial of due process of law so long as it is fair and impartial, and that the use of evidence through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial.

People v. Gonzales, supra, pp. 170, 171.

This court in *Wolf v. Colorado,* 338 U. S. 25, stated:

> "Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons,

> together with those who emerge scatheless f
> search, to the remedies of private action anrom a
> protection as the internal discipline of the l such
> under the eyes of an alert public opinion, may police,
> Granting that in practice the exclusion of evafford.
> may be an effective way of deterring unreasidence
> searches, it is not for this court to condemn as onable
> below the minimal standards assured by the Dufalling
> cess Clause a State's reliance upon other me Pro-
> which, if consistently enforced, would be equaethods
> fective . . . We hold, therefore, that in a prlly ef-
> tion in a State court for a State crime the Fourosecu-
> Amendment does not forbid the admission of evteenth
> obtained by an unreasonable search and seizure idence
> . . ."

A complete answer to petitioner's arguments I and II is found in the decision of the District Court of Appeal in the case of *People v. Sica*, 112 A. C. A. 671, decided August 7, 1952, petition for hearing denied by California Supreme Court September 4, 1952. The defendants were prosecuted for a conspiracy to carry on a bookmaking enterprise and much of the evidence had been obtained through the installation of a dictaphone in the defendants' place of business and by the establishment of a listening post some 300 feet away. Defendants urged that the trial court erred in admitting the testimony of the police officers with respect to conversations heard by this means as being in violation of the Federal and State Constitutions. The District Court of Appeal stated in its decision affirming the convictions:

> "The constitutional protection of the Fifth Amendment against compulsory self-incrimination may not be invoked as a restriction on a state court to prevent the use of otherwise competent evidence allegedly obtained by illegal means, so long as the

requirements of the due process clause of the Fourteenth Amendment are not infringed. (*Adamson v. California*, 332 U. S. 46, 54 [67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223]. See *People v. Gonzales, supra*, p. 170.) The vitality of these cases is not undermined by the decision in *Rochin v. California*, 342 U. S. 165 [72 S. Ct. 205, 96 L. Ed. .....], where the court specifically held that the evidence objected to was obtained in a manner so shocking to the established traditions of American justice, in view of the brutal treatment inflicted on defendant by police officers, as to offend the concept of a fair trial as embodied in the due process clause of the Fourteenth Amendment. (See *People v. Kendall*, 111 Cal. App. (2) ....., ... [244 P. 418].) No such claim is advanced by defendant in the case at bar. Neither do the circumstances of their arrest nor the conduct of the law enforcement officials even remotely parallel the events condemned by the United States Supreme Court in the Rochin case . . .

"Furthermore, the record shows that the recordings of the telephone conversations were made not by any mechanical interception (wiretapping) but through the use of a microphone which transmitted the conversations to the recording instrument and to the listening post. Even in the federal courts, where evidence obtained by wiretapping is excluded (*United States v. Bernava*, 95 F. 2d 310; *Nardone v. United States*, 302 U. S. 379 [58 S. Ct. 275, 82 L. Ed. 314), the use of a microphone to overhear a telephone conversation is considered neither as wiretapping nor an interception of a communication within section 605 of the Federal Communications Act. (*Goldman v. United States*, 316 U. S. 129, 133-134 [62 S. Ct. 993, 86 L. Ed. 1322].) Since the dictaphone was not physically connected with any tele-

phone wire, section 640 of the Penal Code has no application to the facts of this case. Section 653h of the Penal Code, which makes the unauthorized installations of dictagraphs on certain designated premises a misdemeanor, permits a peace officer who is expressly authorized by the head of his department to use and install such instruments 'when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.' The evidence indicates a compliance with that section. . . .

"The failure of these defendants to deny their participation in any of the recorded conversations justified the jury in drawing an inference unfavorable to them on this issue. (California Constitution, Act 1, sec. 13; *People v. Adamson,* 27 Cal. 2d 478, 490-491 [165 P. 2d 3].)"

The use of dictaphones has been held to be a lawful means of detecting crime, and not to be a violation of any constitutional provision, State or Federal.

Goldman v. United States, 316 U. S. 129.

The reasonable use of dictagraphs by peace officers in the performance of their duties is sanctioned by reason, by judicial precedent and by statutory enactment, and evidence obtained through wire-tapping, or by the use of dictagraphs or dictaphones without the knowledge or consent of the persons under investigation, is not inadmissible as the result of an unreasonable search or seizure within the meaning of the Fourth Amendment.

Olmstead v. United States, 277 U. S. 438;

Goldman v. United States, 316 U. S. 129.

Recording of incriminating conversation made without the knowledge of the person against whom it is used as evidence is essentially the same as evidence of a conversation directly overheard. There is no more reason to exclude the one than the other.

United States v. Schanerman, 150 F. 2d 941, 944.

Evidence obtained by eavesdropping, strategem, or by an investigator as a feigned accomplice is not subject to objection because of the manner in which is is obtained.

Sorrels v. United States, 287 U. S. 435.

The use in a federal criminal case of testimony as to damaging admissions by the accused in a conversation on the premises of the accused which the witness, outside such premises, was enabled to overhear by radio transmitter concealed on the person of the other party to the conversation, was held not to violate the constitutional immunity of the accused from unreasonable searches and seizures, not to be within the prohibition of the Federal Wire Tapping Act, and not to be inconsistent with fair play in federal law enforcement in the case of *On Lee v. United States,* 96 L. Ed. Adv. Op. No. 16, page 770. On page 774, this court stated:

> "The presence of a radio set is not sufficient to suggest more than the most attenuated analogy to wiretapping. Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard. This was due to aid from a transmitter and receiver, to be sure, but the same effect on his privacy as if agent Lee had been eavesdropping outside an open window. The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure,

> even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment. . . ."

And on page 776:

> "We think the administration of justice is better served if stratagems such as we have here are regarded as raising, not questions of law, but issues of credibility. . . ."

It should be noted that petitioner alleges that microphones were placed in "petitioner's home." (Pet. p. 3.) However, there is no evidence in the record to support such statement. The facts revealed that petitioner was not married to Annette Eckhart [R. 204-205]. The only reasonable inference to be drawn from this evidence was that he merely rented and kept Mrs. Eckhart at the apartment. The constitutional guarantee from unreasonable searches and seizures should apply only to "one's home" and not to the home of another. Petitioner did not testify where his actual home was and thus failed to show that his rights were violated. The officer in fact gave testimony that this apartment was where Mrs. Annette Eckhart lives [R. 19]. If any complaint of an unreasonable search or seizure is to be made, it should be by her and not one who is a mere visitor engaged in immoral conduct at such premises.

II.

Subdivision 5 of Section 647 of the Penal Code of the State of California Is Constitutional and Is Not Repugnant to the Constitution.

Penal Code, section 647, subdivision 5, provides:

> "Every idle, or lewd, or dissolute person, or associate of known thieves; . . . is a vagrant and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Petitioner was charged with being a lewd and dissolute person in violation of the above provisions [R. 1].

Due process of law requires criminal statutes to be sufficiently certain and definite to inform citizens of the acts which it is intended to prohibit. The requirements of reasonable certainty do not preclude the ordinary terms to express ideas which find adequate interpretation in common use and understanding.

Sproules v. Binford, 286 U. S. 374, 393.

In answer to an attack on this section as being vague and uncertain, the District Court of Appeal in the case of *In re McCue, 7* Cal. App. 765, stated:

> ". . . But this cannot be said of lewdness or dissoluteness—terms often used interchangeably but each of which applies to the unlawful indulgence of lust, whether in public or private . . . The elements of lewdness and dissoluteness, under the accepted definition of those terms, comes directly within the inhibited practices and are proper subjects of regulation and prohibition . . . The constitutional right of due process of law will not be given

effect as will render impossible laws which are generally admitted to be essential to the safety and well-being of society. (Lent v. Tillson, 72 Cal. 425 [14 Pac. 71.]) One charged, as was petitioner, with being an idle, lewd and dissolute person is sufficiently advised of the character of his offense. To say that the legislature must specify the many evil and corrupt practices which might constitute one a lewd or dissolute person would often render the enforcement of a police regulation in connection therewith impossible, and this without considering the indelicacy and impropriety of expression which would often be necessary."

Respondent directs the attention of this court to a decision of the Appellate Department of the Superior Court of Los Angeles County in the case of *People v. Stompanato*, Cr. App. 2566. It was there held that the words "idle" and "associate of known thieves" found in subdivision 5 of Section 647, Penal Code, were too vague and uncertain to serve successfully as a part of a statute creating a crime, and that where a complaint charged these provisions the judgment must be reversed if based upon either of these charges. Since said decision, no complaints have been issued charging one to be a vagrant by reason of being an "idle" person or "associate of known thieves."

The District Court of Appeal of the State of California, in the case of *People v. Babb*, 103 Cal. App. 2d 326, held this subdivision and section to be constitutional as against a contention that it failed to state a public offense. The court held the terms "lewd" and "dissolute" to be terms often used interchangeably; that each applied to the unlawful indulgence in lust, whether in public or private; that "lewd" was defined to mean lustful, libidinous,

lascivious and unchaste; "dissolute" to mean loose in morals and conduct, wanton, lewd and debauched.

In the case of *State v. Harlow,* 174 Wash. 227, the court held a similarly worded statute to be constitutional. The court said the words "lewd," "disorderly" and "dissolute" are words of common and general use, and are easily understood by men and women of average intelligence; that it doubted whether definition could make them clearer.

In the case of *People v. Scott,* 113 Cal. App. (Supp.) 778, the Appellate Department of the Superior Court of Los Angeles County stated that where the legislature of a state has taken upon itself the regulation of vagrants by statute, the words therein must bear the interpretation thereby made or intended; that "dissolute" was defined to mean loosed from restraint, recklessly abandoned to sensual pleasures, profligate, wanton, lewd and debauched.

The word "lewd" when applied to dancing is generally and unmistakably understood to mean indecent, lascivious, lecherous, tending to excite lustful thoughts. It was stated by the court in *State v. Rose,* 147 La. 243, 84 So. 643, that if these words were contained in the statute, they would amount to nothing but tautology, which is no more desirable in a statute than in a newspaper article.

The following language is taken from the case of *Winters v. New York,* 333 U. S. 507:

> "This court goes far to uphold state statutes that deal with offenses, difficult to define, when they are not entwined with limitations on free expression. We have the same attitude toward federal statutes. Only a definite conviction by a majority of this

Court that the conviction violates the Fourteenth Amendment justifies reversal of the court primarily charged with responsibility to protect persons from conviction under a vague state statute.

"The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct . . ."

From the above it would appear that the word "lewd" has been declared by this court to be well understood and properly used in criminal law and removed from the class of words which may be said to be vague.

The Appellate Department of the Superior Court of Los Angeles County has held the portions of subdivision 5 of Section 647, Penal Code, as here charged to be constitutional against challenges similar to those set forth in the petition herein filed. That court stated:

"We were and are satisfied that these statutes do not violate either the California or the Federal Constitution, whether for uncertainty for infringement of constitutional rights or otherwise."

People v. Elliott, Cr. App. 2446;

People v. Brown, Cr. App. 2447.

We submit that the words "lewd" and "dissolute" are words of common knowledge and understanding and are defined in all standard dictionaries. Any person of average intelligence is sufficiently advised of the character of an offense if such words are the basis of the statute and complaint. It is noted that petitioner had no difficulty in understanding the nature of this charge in order to

enter his plea. The docket entries of the Municipal Court show that no demurrer for uncertainty or for any other reason was filed but that at the time of arraignment, he entered a plea of not guilty and that the matter proceeded to trial after one continuance [R. 3-4].

III.

The Instructions Given Were Proper.

In considering claimed errors in the giving or refusal of instructions, it is the duty of an appellate court to consider the entire cause, including the evidence, to determine whether a miscarriage of justice has resulted.

People v. Cook, 15 Cal. 2d 507.

A single instruction or a portion of an instruction cannot be considered separately from the entire charge.

People v. Frazier, 88 Cal. App. 2d 99.

To determine whether the law is properly declared for the guidance of the jury, the charge as a whole and not an isolated excerpt is to be examined.

People v. Jordan, 24 Cal. App. 2d 39.

In passing upon the correctness of the instructions given in this case, the Appellate Department of the Superior Court found that no miscarriage of justice resulted to petitioner [R. 359].

The instruction here claimed erroneous is supported by the definition of the word "dissolute" in Webster's Unabridged Dictionary and the case of *People v. Scott,* 113 Cal. App. 778. The instructions as a whole fully, fairly and accurately advised the jury of the law applicable to the case submitted to them for decision [R. 310-324].

IV.

Decisions of the Highest Court of the State on Matters of State Law Are Controlling.

Decisions of the highest court of the state on matters of state law are generally conclusive upon the United States Supreme Court.

Huddleston v. Dwyer, 322 U. S. 232, 236.

As pointed out under Point I, the decisions of the California Supreme Court have held it proper to admit evidence, if competent, and will not inquire into or investigate its source or the means by which it was obtained. The admissibility of the evidence here presented was properly received in support of the charge that petitioner was a lewd and dissolute person. The offense of vagrancy differs from most other offenses in the fact that it is chronic rather than acute and continues after it is complete. It depends for its establishment upon proof of the character of the accused. Because of this it is proper in support of the charge to prove conduct of the defendant over a period of time which tends to indicate that character.

People v. Scott, 113 Cal. App. (Supp.) 778, 783;
People v. Craig, 152 Cal. 42, 47.

A person's intent may be proved by his words.
10 Cal. Jur. 1073.

The evidence of a defendant's words and acts clearly warrant the inference that he is a lewd character, "For as he thinketh within himself so is he." (Prov. 23:7.)

The decisions of the courts of California have consistently upheld the validity of the portion of the section

herein involved as set forth in Point II hereof and such decisions should be controlling upon this court as applied to the laws of the State of California.

V.
Conclusion.

The Petition for Writ of Certiorari does not disclose a clear and convincing showing that there has been a violation of petitioner's rights under the Federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not heretofore determined by this court. The authorities hereinbefore cited clearly show that the decision of the highest court of the State of California actually decided the questions of this case in complete accordance with the decisions of this court. The record discloses that petitioner was convicted on two counts and received concurrent jail sentences [R. 13] and that no question is here presented concerning the judgment of conviction on Count I which charged a violation of Section 41.07 of the Los Angeles Municipal Code.

The People of the State of California pray that the petition be denied.

Respectfully submitted,

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